Filed 7/3/19 P. v. Webster CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LARRY WEBSTER, Defendant and Appellant.	C079715 (Super. Ct. No. CR62613)

In 1983, defendant Larry Webster was convicted of first degree murder while lying in wait and while engaged in the commission or attempted commission of robbery. He was sentenced to death. Defendant unsuccessfully appealed his case to the California Supreme Court, which also denied his petition for habeas corpus on the ground of ineffective assistance of counsel. (*People v. Webster* (1991) 54 Cal.3d 411, 459-460 (*Webster*).) Defendant then petitioned the federal district court for a writ of habeas corpus, and, 31 years after being convicted and sentenced to death, the district court

granted defendant's writ of habeas corpus as to the penalty phase on the ground of ineffective assistance of counsel, although it denied defendant's writ application in all other respects. The district court ordered the trial court to vacate defendant's death sentence and impose a lesser sentence, unless the People commenced a new penalty trial within 90 days of the order. The People did not retry the penalty case, and the superior court took up the matter of resentencing defendant.

Defendant argued his two special circumstances should be stricken in the interest of justice pursuant to Penal Code[1] section 1385, resulting in a sentence of life with parole. The trial court denied defendant's motion to strike the special circumstances and sentenced him to life without the possibility of parole. Defendant argues the trial court abused its discretion in refusing to strike the special circumstances, and that his sentence violates due process and double jeopardy, and constitutes cruel and unusual punishment. We conclude the trial court did not abuse its discretion, and that the sentence does not violate the other constitutional provisions argued by defendant.

We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background is taken from the Supreme Court's opinion in *Webster*, *supra*, 54 Cal.3d 411.

Guilt Trial

1. *Prosecution evidence.*

The principal prosecution witnesses were Bruce Smith and Michelle Cram. As the jury knew, Smith had already pled guilty to second degree murder in connection with the homicide, and Cram had been granted immunity in return for her testimony.

---

1 Undesignated statutory references are to the Penal Code.

Smith and Cram provided the following account, differing only in minor details: In late August 1981, defendant, Joseph Madrigal, Carl Williams, Robert Coville, Smith, and the 17-year-old Cram were living at a riverbank encampment in Sacramento. Defendant was the group leader. On the night of August 29, Smith, Madrigal, and Coville robbed a nearby convenience store. Quick response by the police forced the trio to hide for several hours before returning to camp.

The next day, August 30, defendant and Williams made one of several trips to buy beer, which the camp residents were consuming at a steady pace. When the men returned in early afternoon, defendant said they had met two "outlaws" ("street persons" or "survivors") at the Shell station near the convenience store. Defendant reported there was still intense police activity in the area because of the robbery, and he suggested the group needed to leave town. Defendant said he had arranged to use the "outlaws" car for joint drug purchases or robberies that evening. The opportunity arose, he suggested, to lure one of the "outlaws" back to the camp, kill him, and steal the car.

Madrigal, Coville, and Williams expressed enthusiasm for the plan. According to Cram, defendant said he personally would kill and dismember the victim; according to Smith, Coville said he "hadn't killed somebody in quite a while" and would "take care of it." When Cram expressed skepticism about defendant's boasts, he insisted he was serious. Defendant said this would be Cram's first criminal lesson and would help her become more independent from Williams, with whom she was living.

It was decided that because the "outlaws" knew Williams, he would walk back to the Shell station with defendant to meet them. Madrigal would go along. Once the three returned to camp with the intended victim, either defendant (according to Cram) or Coville (according to Smith) would kill him. Defendant showed Smith where to dig a grave and told Cram to clean up the campsite and pack in preparation for the group's departure. Defendant, Williams, and Madrigal then left for a 7:30 p.m. meeting with the "outlaws." Defendant had drunk beer all day and may have taken amphetamines. As usual, defendant was wearing glasses; Williams wore a cowboy hat.

While the three men were gone, Smith and Cram worked at their assignments; Coville sat and drank beer. After half an hour's absence, defendant called out from the top of a levee that his group had returned. Four men walked single file down the trail to the camp. Williams was in the lead, followed in order by Madrigal, victim Burke, and defendant. When the four were about halfway down the trail, defendant suddenly

grabbed Burke and pulled a knife. According to Smith, defendant moved around to the front of Burke and stabbed him; Cram saw defendant reach from behind to stab Burke in the chest. Burke protested, and a struggle ensued. Madrigal turned back to assist defendant. Burke began to make gurgling sounds.

Cram became hysterical, so defendant and Williams told Smith to take her to "Fag Beach" and wait. Ten minutes later, defendant, Madrigal, Williams, and Coville arrived at the "Fag Beach" parking lot with the group's belongings. Defendant gave Coville a car key, which Coville used to unlock the trunk of a car parked in the lot. The group loaded their possessions in the car, proceeded to Interstate 5, and drove all night toward Southern California. Defendant indicated that they should eventually turn east, toward Missouri.

As they rode, Madrigal explained to Smith that "the man had died hard." Madrigal said Burke had managed to grab defendant's knife and inflict a thigh wound on defendant before Madrigal joined in to help defendant "finish the job and get his knife back." Madrigal indicated that he himself had been slashed across the stomach by Burke during the struggle. Smith said that, at one point, he saw defendant's and Madrigal's knives in the car.

About 3:30 p.m. the next day, as defendant was driving, an officer of the California Highway Patrol (CHP) stopped the group's car for speeding on Interstate 15 near Barstow. Investigation stemming from the traffic stop eventually led to the arrest of all six passengers, and to statements by Smith and Cram concerning the Burke homicide. . . . On September 8, Detective Burchett of the Sacramento Police Department took an in-custody statement from Cram which essentially conformed to her trial testimony.

Guided by Smith's directions, the police found Burke's body in its shallow riverbank grave on the morning of September 3. Burke's throat had been cut, and there were 24 other stab wounds, 8 in the rear of the body. The wounds could have been inflicted by more than one knife and more than one person. Burke's pants pocket was turned out, but his wallet had not been taken.

The car in which the group was arrested was registered to Ronnie Glover. Glover testified that on the evening of August 30, he loaned the car to his cousin Burke, with whom he was travelling. Burke then left the Shell station in the company of three men meeting the descriptions of defendant (glasses), Madrigal, and Williams (cowboy hat). Glover never saw Burke or the car again.

When examined at the time of booking, Madrigal and defendant both had fresh injuries. Defendant's wound was on the knee. A bloodstained knife was found in the car taken from Glover and Burke.

2. *Defense evidence.*

Defendant testified in his own behalf. He denied any plan to kill the victim and steal his car. The camp residents had engaged in a drunken discussion about killing people, but defendant insisted he merely taunted the others to show they were not as "tough" as they maintained. Defendant did tell the "sniveling" Cram that "[t]his will be your first day of school," but the remark was intended only to "shut her up." He did not order anyone to dig a grave or break camp before he went to meet Glover and Burke.

Later, according to defendant, Burke handed him the car keys when they arrived at the "Fag Beach" parking lot. Defendant was "fairly loaded" but not staggering drunk. As the four men walked from the car toward the camp, he and Burke were arguing over how to split the proceeds of drug sales and robberies planned for later in the evening. Burke wanted a larger share because he had furnished the car. Burke suddenly pulled a knife and slashed defendant on the leg. Defendant managed to get control of Burke's weapon and defended himself. Burke kept "charging" at defendant and Madrigal, forcing them to continue stabbing him. Burke could have left had he wished to do so.

Only after Burke's death, defendant said, did the group decide to take the car and flee. Attempts to dig a makeshift grave were unsuccessful, so they dragged Burke's body under a bush. They also threw knives belonging to defendant, Madrigal, Burke, and Smith into the river. Defendant denied going through Burke's pockets. He could not name the owner of the knife found in the car but said it was not Madrigal's.

William Gaida, a Sacramento detective, testified about a statement taken from Cram on September 2, which differed in minor respects from Cram's trial testimony. Larry Moser testified that several years earlier, he was seriously injured in a barroom fight initiated by Burke.

Coville testified in his own defense. He denied participating in or overhearing a plan to kill Burke. Coville said he was drunk when defendant, Madrigal, and Williams returned to camp with Burke. Coville insisted he did not see the killing of Burke, but defendant later told him "this guy [had] jumped on [defendant] and stuck him with a knife" and defendant thought the "guy" was dead after a struggle. Coville recited in some detail how the group reached Burke's car and left town.

A psychiatrist, Dr. Globus, testified that Coville was an alcoholic with brain damage and a history of "amnestic episodes." Coville told Dr. Globus he remembered little of the incident besides drinking and "partying." Dr. Globus believed Coville and concluded he could not have formed the mental states necessary for malice, premeditation, lying in wait, or intent to kill.

Neither Williams nor Madrigal testified. Madrigal's long history of behavioral and psychiatric problems and drug and alcohol abuse was detailed. Dr. Mungas, a psychologist, testified that Madrigal had hazy memories of a fight but remembered no details. Dr. Mertz, a psychiatrist, testified that Williams told her he had been consuming beer and amphetamines continuously by the evening of August 30; he remembered going to the Shell station and returning with Burke; he heard a scuffle behind him and took Cram away. Dr. Mertz concluded that because of drug and alcohol intoxication, Williams had diminished capacity to conspire, harbor malice, premeditate, or intend to kill.

Penalty Trial

1. *Prosecution evidence.*

The People presented evidence that in the early morning of August 31, 1981, the day after the Burke homicide, defendant, Madrigal, Smith, and Williams robbed a convenience store in Pacoima. The prosecution presented a videotape of the robbery, along with the testimony of Smith and the store clerk, Eli Yitshaky. The evidence indicated that defendant was the ringleader, that he and Madrigal brandished knives, and that Yitshaky was knocked unconscious after complying with the robbers' order to lie down on the floor. The robbers took food, money from the cash register, and Yitshaky's personal property. Defendant, who followed Smith from the store, told Smith he had "punched [Yitshaky] out" and had taken his wallet and watch.

The prosecution introduced evidence that on October 31, 1981, defendant and Madrigal were convicted of armed robbery in the Pacoima case. Two Washington State felony convictions against defendant were also presented: a 1977 conviction for second degree assault, and a 1974 conviction for second degree burglary.

2. *Defense evidence.*

Several members of defendant's family testified in his behalf. According to his two sisters, the family was poor. Their father was

> unemployed and a cruel alcoholic who often beat the children and their mother. Still, defendant was cooperative and hardworking until he returned from his two combat tours in Vietnam. Thereafter, his personality was completely changed; he was remote and bitter. He complained that television news about the war was inaccurate. While drinking in a bar with his sister Linda Moss, defendant cried and said he had run over a Vietnamese child while driving his Army supply truck during maneuvers. Defendant's mother confirmed her son's personality change after Vietnam and pleaded for his life.
>
> Defendant produced documentary evidence that he had received the Bronze Star for combat bravery in Vietnam. The citation for this medal indicated that defendant, disregarding his own safety, had leveled "devastating" machine-gun fire on an advancing enemy force to protect tanks that were taking on ammunition from his supply truck.
>
> Finally, defendant presented evidence about his efforts to learn a trade in the Washington State Penitentiary. A prison vocational counselor said defendant approached him for assistance in entering auto-body and welding courses. According to his instructors, defendant's performance in the auto-body class was average; his performance in a welding class was excellent. (*Id*. at pp. 423-438, fns. omitted.)

The jury convicted defendant of first degree murder with personal use of a deadly and dangerous weapon, robbery, conspiracy to commit first degree murder and robbery, and grand theft of an automobile. (*Webster*, *supra*, 54 Cal.3d at p. 423.) The jury found as special circumstances that defendant intentionally committed the murder while lying in wait and while engaged in the commission or attempted commission of a robbery. (*Ibid*.) The jury fixed defendant's punishment at death. (*Ibid*.) The Supreme Court affirmed defendant's guilt and penalty judgments. (*Id*. at p. 460.) Defendant filed a separate petition for habeas corpus with the Supreme Court alleging ineffective assistance of trial counsel and newly discovered evidence warranting a retrial. (*Id*. at p. 423.) The Supreme Court denied the petition. (*Ibid*.)

Defendant then filed a petition for writ of habeas corpus in federal district court. The magistrate judge recommended the petition be granted on the claim of ineffective assistance of counsel at the penalty phase. The district court granted the writ on the

grounds defendant was denied effective assistance of counsel in connection with the penalty phase of his trial, and ordered: "Petitioner's sentence of death shall be vacated and a lesser sentence imposed that is consistent with state law, unless the state commences a new penalty trial within ninety (90) days of the filed date of this order." The district court denied the application in all other respects.

The People did not seek to retry the penalty trial, and the matter was set for sentencing. Defendant filed a motion to strike the special circumstances in the furtherance of justice. He argued the trial court had the power under section 1385 to dismiss a finding of special circumstances in order to modify a sentence of life imprisonment without the possibility of parole.[2] Defendant argued his background of privation and military service dealt him a bad hand that he could not overcome.

Defendant presented evidence he had been born into a "hopelessly poor family." During defendant's childhood, his family lived without electricity, decent heating, medical care, telephone, or plumbing. They had little to eat. Defendant's father was an alcoholic who regularly abused his wife and children. When defendant was 16 he dropped out of school to pick fruit to help the family financially. Defendant enlisted in the Army at age 19 and served two tours in Vietnam. He received the following awards for his service: a Combat Infantryman Badge, a Commendation Medal, a National Defense Service Medal, a Vietnam Campaign Medal, the Vietnamese Gallantry Cross, a Vietnam Service Medal with three bronze stars, and the Bronze Star Medal with Valor.

Unfortunately, the war also exposed him to drug use. He began to use marijuana, opium, and speed during his first tour of duty and started using heroin during his second

---

[2] Section 1385 provides that a judge may order an action dismissed in furtherance of justice. Section 1385.1, which was added by initiative measure in 1990 after defendant's trial, provides that notwithstanding section 1385, a judge shall not strike or dismiss any special circumstance.

tour. By the time he returned to the States, he was addicted to drugs and alcohol. He was eventually discharged from the Army under honorable conditions, having been found in possession of marijuana. A psychiatrist hired as an expert by defendant's counsel concluded to a reasonable degree of medical certainty that defendant met the criteria for a diagnosis of posttraumatic stress disorder (PTSD). The expert concluded that PTSD and depression caused defendant to use alcohol to self-medicate, and that these factors "affected his mental state at the time of the offense, even had he not been as intoxicated as he was at that time. In other words, his impulse control and perception of reality would be diminished already by the effects of the intoxication; the likelihood of a reaction to a perceived threat, even one that may not have been present, is therefore even greater for someone suffering from PTSD who is also intoxicated at the time."

At the new sentencing hearing, the trial court considered defendant's motion to strike the special circumstances.

The court stated that it would assume it had the authority to rule on the motion to strike the special circumstances. The court then detailed its ruling:

> "Again, I have read and considered all the information provided by the defense, and there is true mitigation in this case unlike some other cases I have seen. The defendant was youthful, and he signed up to serve. He served with Honor, and he suffered, according to his experts, significant post-traumatic stress which [led] him to a life of drug and alcohol abuse which [led] to a series . . . of life decisions. Unfortunately, those life decisions were serious and involved great violence.
>
> "The one thing I would take exception in your recitation, . . . is that the defendant at his trial or later has acknowledged responsibility for the crime. If you mean by that that he admitted that he was a participant in the events and that he was involved in the stabbing of the victim, in that sense he acknowledged responsibility, but as I read the probation report, the acknowledgement was I was participating but I do not acknowledge that this was my fault. I do not acknowledge primacy or ringleader capacity, and I certainly don't acknowledge anything other than I was just defending myself. That was his position at trial, and that was his position post-trial.

That is not what I consider acknowledging responsibility for a pretty vicious crime.

"As indicated by the D.A., the defendant was the prime planner and mover in a vicious killing of a vulnerable victim, as I understand it, for the use of a vehicle to drive to Southern California, and he involved in that several people including a young female. Again acknowledging that the social history background offered by the defendant in this matter is truly mitigating in that it's not a—it's not concocted, it's real, Mr. Webster really did fight in Vietnam. He fought with distinction. He served his country. As a result of that, he became involved in alcohol and drugs and all of those situations obviously affected his thinking and his conduct in society.

"The question is whether or not those factors along with the other factors you have argued, specifically the alleged disproportionality of a [life without parole] sentence, the life without possibility of parole sentence, the claim of double jeopardy, and now the interesting claim that you have added which is a sentence of death causing someone to serve for three decades on death row when he suffered an ineffective assistance of counsel and therefore may not have had to serve on death row for those years, may have been another type of custody, that should also be considered as mitigating.

"That's certainly an unusual argument, and it is not—I would not dismiss it as being completely without merit, but in my view, all of those things, even put together, his social history, his Vietnam service, his alcohol, his drug use, the fact that he has spent 31 years on death row, none of those to me would suggest that in the interest of justice, and I think that's the standard that I would fall on today, I'm required to look to, whether or not the special circumstances that's found true by this jury over three decades ago should be stricken.

". . . This is not a case where the defendant is one of several participants in a crime where he has moderate or minor involvement. That's not the case at all. He is the leader of this crime. The crime involved, as I understand it, the actual preparation of the hiding place for the victim post planned murder. They carried out the murder, a stabbing murder of great violence, and after that fled for other parts of the state.

"In my view, . . . even considering all the mitigation presented, considering the double jeopardy arguments, the disproportionality arguments and the time spent on death row arguments, I do not believe it would be in the interest of justice to strike the special circumstances."

DISCUSSION

I

Special Circumstances

Like the trial court, we shall assume the court had jurisdiction to strike the special circumstances, and concentrate our efforts on deciding whether the trial court abused its discretion in declining to strike them.[3]

Defendant argues the trial court abused its discretion in denying the request to strike the special circumstances for four reasons. First, defendant argues the trial court abused its discretion in not recognizing and crediting the particulars of defendant's background, character, and prospects. Defendant points to his "hopelessly poor family[,]" his heroic conduct in the Vietnam War, and his PTSD as a result of that war. Defendant claims the trial court was not "guided by the negative impact [his] childhood of violence, marginalization, and privation had on him." He claims his military service alone is sufficient to strike the special circumstances findings. He claims he was genetically and psychologically predisposed to substance abuse, and that his PTSD requires lenient treatment.

Second, defendant argues he should receive leniency because he has already spent 31 years in prison on death row, because the sacrifices of combat veterans must be honored by society, and because the interest of society in the fair prosecution of crimes required a life with parole sentence.

Third, defendant argues the life without parole sentence violates his constitutional right to be free from cruel and unusual punishment. He argues the punishment is cruel and unusual because his criminal conduct was partially a function of his mental disorder

---

[3] Both parties recognize that at the time the crimes occurred trial courts had the authority to strike special circumstances, but that authority was taken away by the voters in 1990. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 286, 298.)

(PTSD). He also argues his Sixth Amendment right to effective counsel was violated, and that "[n]o reasonable judge would have refused to strike the special circumstances in light of the grave constitutional violations in this case."

Fourth, defendant argues the trial court was wrong to characterize him as the leader in planning the murder, committing the murder, and covering up after the murder.

Defendant cites numerous cases in support of his argument that his background, character, and prospects required the court to strike the special circumstances. All of these cases, including *People v. Orabuena* (2004) 116 Cal.App.4th 84, *Williams v. Taylor* (2000) 529 U.S. 362 [146 L.Ed.2d 389], *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, *Ainsworth v. Woodford* (9th Cir. 2001) 268 F.3d 868, *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, *Correll v. Ryan* (9th Cir. 2006) 465 F.3d 1006, *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, and *Porter v. McCollum* (2009) 558 U.S. 30 [175 L.Ed.2d 398] (*Porter*), present a different issue and different standard of judicial review from this case. In *Orabuena*, the trial court did not exercise its discretion under section 1385 because it did not believe it had the discretion to dismiss a conviction. (*Orabuena*, at p. 99.) The court held a failure to exercise discretion is an abuse of discretion. (*Ibid*.) The remaining cases concern whether the defendants were entitled to habeas relief because of ineffective assistance of counsel at the penalty phase. In those cases the question was whether trial counsel was deficient in failing to investigate and present evidence, and if so, whether there was a reasonable probability that but for the deficient performance the result of the proceeding would have been different. (See, e.g., *Ainsworth*, at pp. 873, 878.)

Here, by contrast, we are presented a case where habeas relief has been granted, and the case has been sent back to the trial court for resentencing. At resentencing, the trial court considered and ruled on defendant's motion to strike the special circumstances pursuant to section 1385. We review the trial court's section 1385 decision under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367,

374.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.)

Defendant is incorrect to assert that the trial court did not recognize and credit his background, character, and prospects. The trial court recognized that defendant had "experienced great, extreme difficulty in Vietnam, and based on what he went through with his family, that was also an extremely difficult situation . . . ." The trial court indicated it had "read and considered all the information provided by the defense, and there is true mitigation in this case unlike some other cases I have seen." Nevertheless, citing defendant's leadership role in the crime, the planning and preparation involved in the crime and cover-up, and the decision to flee to avoid capture, the trial court found that the interest of justice standard did not indicate that the special circumstances should be stricken.

The trial court also considered defendant's time on death row and his military sacrifices, noting that defendant "served with Honor, and he suffered . . . significant post-traumatic stress . . . ." The court recognized defendant's argument that being imprisoned "for three decades on death row when he suffered an ineffective assistance of counsel and therefore may not have had to serve on death row for those years" should be considered as a mitigating factor. The court found the argument "unusual" and not "completely

without merit," but nevertheless not sufficient to strike the special circumstances in the interest of justice.

The trial court considered defendant's constitutional arguments, stating it had considered "the double jeopardy arguments, the disproportionality arguments and the time spent on death row arguments, I do not believe it would be in the interest of justice to strike the special circumstances."

Defendant is incorrect that the trial court "failed to consider the impact of [defendant's] military service and subsequent psychological disorder on the circumstances of the crime." Defendant does not deny that he took the leading role in the murder, but blames his participation on the trauma he suffered in Vietnam. In fact, the trial court specifically noted defendant's military service and resulting mental disorder, "which [led] him to a life of drug and alcohol abuse which . . . certainly factored in a series of life decisions."

The Supreme Court has established the boundaries of the judicial power to "order an action to be dismissed" in the furtherance of justice pursuant to section 1385, subdivision (a). The "paramount" principle is that the court must consider both "the constitutional rights of the defendant, and *the interests of society represented by the People*." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) A dismissal must be motivated by a reason that would motivate a reasonable judge. (*Id*. at pp. 530-531.) A court abuses its discretion if it dismisses an action (or special circumstance) solely because of judicial convenience, because a defendant pleads guilty, or because of a personal antipathy for the law. (*Id*. at p. 531.) Other factors the Supreme Court has considered are the nature and circumstances of the present offense and prior offenses, and the defendant's background, character, or prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 163.)

The trial court's decision below was not so irrational or arbitrary that no reasonable person could agree with it. The trial court considered all of the information

provided by the defense, and balanced those arguments against the interests of society represented by the People. As the trial court indicated, defendant was the leader of the crime, convincing others to assist in planning the crime, committing the crime, and covering up the crime. (*Webster, supra*, 54 Cal.3d at pp. 424-425.) The murder was committed in order to steal the victim's car. (*Id*. at p. 424.) Defendant and his cohorts lured the victim into the area where they killed him. (*Ibid*.) The knife attack was particularly brutal, with the victim's throat being cut, and the victim's body having suffered 24 other stab wounds. (*Id*. at p. 425.) Defendant boasted to his cohorts prior to the murder about having killed before. (*Id*. at p. 424.) Even considering the mitigating evidence presented by defendant, the trial court's decision was not outside the bounds of reason. There was no abuse of discretion.

II

Weighing of Defendant's Constitutional Rights

Defendant argues the trial court erred by considering his constitutional rights as mitigation evidence related to his background and character, and not separately weighing his constitutional rights. He claims that by evaluating the violation of his constitutional rights as mitigation, the court failed to consider society's interest in preserving those constitutional rights. We find no merit to this argument.

At the sentencing rehearing, counsel argued a sentence of life without the possibility of parole would be disproportionate to the crime committed, argued defendant should not have been on death row for 31 years due to the ineffective assistance of counsel, and that a life without the possibility of parole sentence would be cruel and unusual. After counsel's argument the trial court asked defense counsel for the following "clarification": "You've asked me to consider this body of mitigating evidence, the post-traumatic stress, and his war experiences, but you've also put on top of that these constitutional issues. You are not asking me to factor in the constitutional issues as mitigating; you are asking me to consider those really as separate categories for reasons

to strike. In other words, you have a body of mitigation and then also additional constitutional suggestions. . . . So you are putting this into two separate categories, yes, am I understanding you correctly in that?" Defense counsel replied: "Well, in two separate categories but they kind of merge at some level. All of the mitigation evidence that we presented to you the Court should consider in terms of its sentence, okay? [¶] . . . [¶] But because we are in a unique situation in that [defendant] has been on [death] row for 31 years, et cetera, there are constitutional provisions that the Court must consider when it decides whether or not the striking of the special circumstances would be in the furtherance of justice because that's one of the components that the Court must consider, what are the constitutional effects of a sentence like this? That's why we have the double jeopardy violation. That's why we have the other articulated legal reasons, if you will."

Later, the trial court reiterated its understanding of the issue presented by the defense: "The question is whether or not those factors along with the other factors you have argued, specifically the alleged disproportionality of a [life without parole] sentence, the life without possibility of parole sentence, the claim of double jeopardy, . . should also be considered as mitigating." Finally, the court stated: "[E]ven considering all the mitigation presented, considering the double jeopardy arguments, the disproportionality arguments and the time spent on death row arguments, I do not believe it would be in the interest of justice to strike the special circumstances."

Thus, any confusion regarding how the trial court should consider the asserted constitutional violations was invited error. The invited error doctrine prevents an accused from gaining a reversal on appeal because of an error made by the trial court at his request. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) In any event the trial court weighed defendant's constitutional claims and factored them into its decision. It does not appear the trial court's decision would have or should have been any different had it considered the constitutional claims separately. As we set forth below, defendant's

constitutional rights under the Eighth and Fifth Amendments have not been violated, and the Sixth Amendment violation has been remedied.

III

No Due Process Violation

Defendant argues the trial court's denial of his motion to strike the special circumstances violated his due process rights under the California Constitution and the Fourteenth Amendment. His reasoning is that a state's failure to abide by its own statutory commands, specifically section 1385, may implicate the Fourteenth Amendment. As explained in part I if of the Discussion, *ante*, section 1385 allows a court in its discretion to dismiss an action in furtherance of justice. The statute is not violated if the court acts within its discretion. We have determined the trial court did act within its discretion, therefore there was no statutory violation and no due process violation.

IV

No Cruel and Unusual Punishment

Defendant argues his sentence constituted cruel and unusual punishment in violation of the guarantees of the Eighth Amendment of the federal Constitution and the California Constitution. A sentence does not violate the Eighth Amendment absent gross disproportionality. (*Ewing v. California* (2003) 538 U.S. 11 [155 L.Ed.2d 108].) A sentence does not violate the California Constitution unless it is so disproportionate to the crime and circumstances that it shocks the conscience or offends traditional notions of human dignity. (*People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*); *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) Defendant advances several reasons for which he argues a life without parole sentence is cruel and unusual. We address them in order.

First, citing *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407] (*Miller*), he argues the United States Constitution prohibits life without parole sentences "for defendants who do not bear sufficient moral culpability to be deemed the worst

offenders." *Miller* held that the Eighth Amendment forbids a sentence that amounts to life in prison without the possibility of parole for *juvenile offenders*. (*Id.* at p. 479.) Specifically, *Miller* held that for purposes of sentencing, minors are "constitutionally different" from adults because they have "diminished culpability and greater prospects for reform," making them " 'less deserving of the most severe punishments.' " (*Id.* at p. 471.) Defendant was not a juvenile when he committed his crime, thus *Miller* provides no authority for defendant's claim.

Second, citing *Miller* again and *Atkins v. Virginia* (2002) 536 U.S. 304 [153 L.Ed.2d 335], defendant argues the imposition of life without parole would serve no meaningful retributive, deterrent or rehabilitative objective because his PTSD lessened his ability to control his impulses and resulted in a diminished capacity to understand and process events. As indicated, *Miller* involved a juvenile defendant. The *Atkins* defendant was "mildly mentally retarded" and was sentenced to death. (*Atkins*, at pp. 308-310.) The court held that the purposes of the death penalty are retribution and deterrence, and that execution of a mentally retarded defendant would not advance either purpose. (*Id*. at p. 321.) The court categorically excluded the mentally retarded from the death penalty. (*Ibid*.)

Defendant argues the reasoning of these cases should be applied here, because he suffered from PTSD. The United States Supreme Court has not applied a categorical exception from a capital sentence for persons suffering from a mental illness. (See *Hodge v. Kentucky* (2012) 568 U.S. 1056 [184 L.Ed.2d 514] [denying habeas relief from the death penalty for a defendant suffering from PTSD].) The California Supreme Court has also rejected claims that the death penalty is disproportionate to a defendant's culpability because of mental illness. (*People v. Poggi* (1988) 45 Cal.3d 306, 348.) This is even more true of a sentence of life without the possibility of parole.

In *People v. Cunningham* (2015) 61 Cal.4th 609, 670-671, the California Supreme Court considered the argument that a death sentence was cruel and unusual because the

defendant's individual culpability was mitigated by his Vietnam War experiences resulting in PTSD. The Supreme Court rejected the argument, stating that "these circumstances ultimately did not affect defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Defendant's actions at the time of the murders showed a rational, logical, intelligent, and calculated thought process, and his efforts to destroy evidence and to avoid capture by fleeing across the country amply demonstrate his awareness of the wrongfulness of his actions." (*Id*. at p. 671.)

This analysis fits the facts of this case as well.[4] Notwithstanding defendant's evidence that he was intoxicated at the time of the murder, defendant developed the plan to lure the victim to the camp, kill him, and steal the victim's car. He gave instructions to his cohorts before the murder to prepare to hide the body and escape the area. After the murder, they drove all night to Southern California. All of this shows a "rational, logical, intelligent, and calculated thought process" and an awareness of the wrongfulness of defendant's actions. (*People v. Cunningham, supra*, 61 Cal.4th at p. 671.) Defendant's life without parole sentence is not cruel and unusual because defendant had PTSD.

Defendant's third argument is that a sentence of life without the possibility of parole is cruel and unusual because it does not comport with the societal trend toward greater leniency for combat veterans. Defendant isolates a statement out of *Porter, supra*, 558 U.S. 30, in support of his argument. In that case, the Supreme Court stated: "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . . ." (*Id*. at p. 43.) However, the holding in *Porter* was merely to grant habeas relief to a death row prisoner on the

---

[4] We deny defendant's request that we take judicial notice of his trial testimony. We are not reviewing the guilt phase of his trial, and for the purpose of assessing the nature of the crime, we must necessarily be limited to the facts as found by the jury.

basis of ineffective assistance after Porter's trial counsel failed to discover or present his military service and other mitigating circumstances during the penalty phase of his trial. (*Id*. at pp. 31-38, 44.) The Supreme Court did not require courts to grant leniency to military veterans, nor did it hold that a military veteran could not be sentenced to life without the possibility of parole.

Fourth, defendant argues his sentence is cruel and unusual because he already wrongly spent 31 years on death row. This statement is not quite accurate. The District Court ordered defendant's death sentence vacated and a lesser sentence imposed, "unless the state commences a new penalty trial within ninety (90) days of the filed date of this order." Defendant is not currently on death row because the People decided not to conduct a new penalty trial. It is entirely possible that defendant would have been sentenced to death again had there been a new penalty trial, thus he was not necessarily "wrongly" sentenced to death row. In any event, there is no authority for the proposition that being "wrongly" sentenced to death row is itself cruel and unusual punishment, or that it renders a subsequent life without parole sentence cruel and unusual.

Finally, defendant argues the sentence is cruel and unusual under the California Constitution because it is so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity. Defendant argues his PTSD, his three relatively minor prior convictions, and his admirable war record make him deserving of a lighter sentence.

In determining whether defendant's sentence is unconstitutionally cruel and unusual, we employ the three part test set forth in *Lynch, supra,* 8 Cal.3d 410. First, we examine the nature of the offense and the offender, and the degree of danger they present to society. (*Id*. at p. 425.) Second, we compare the challenged penalty with punishments for more serious offenses, and third, we compare the punishment with punishments in other jurisdictions for the same offense. (*Id.* at pp. 426-429.) Because defendant's

argument is limited to the first prong, we need not consider the last two prongs of the *Lynch* analysis.

In analyzing the first prong we consider the offense both in the abstract and as it was committed in the case before us. (*Dillon, supra,* 34 Cal.3d at p. 479.) We also consider whether the punishment is grossly disproportionate to the defendant's culpability as shown by his age, prior criminality, personal characteristics, and state of mind. (*Ibid*.) It goes without saying that murder while lying in wait and while in the commission of a robbery is, in the abstract, dangerous to society. In the case before us, defendant personally hatched the plan to kill the victim, and directed others to prepare to hide the body and to escape. He was extensively involved in the murder. The motive for killing the victim was to steal his car, so defendant and his cohorts could leave town to avoid being caught for a robbery they had just committed. They killed the victim after apparently befriending him, and repeatedly stabbed him and slit his throat. They used the car to drive to Southern California where they committed another robbery. Nothing about the nature of the offense indicates a sentence of life without parole is cruel and unusual.

In examining the nature of the offender, we focus on "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon, supra,* 34 Cal.3d at p. 479.) Defendant was an adult (32 years old) when he committed the crime. The murder was neither his first, nor his last crime. He was convicted of second degree burglary in 1973, assault in 1977, and he pled guilty to the robbery in Pacoima. While defendant argued he was impaired at the time of the crime by alcohol, drugs, and mental illness, the murder nevertheless showed a level of planning and deliberation. Even considering defendant's childhood and military service, we cannot say a life without parole sentence is grossly disproportionate to defendant's culpability.

The sentence of life without parole for defendant's crime does not shock the conscience or offend traditional notions of human dignity. (*Lynch*, *supra*, 8 Cal.3d at p. 424.)

V

No Double Jeopardy

Defendant argues that a life without parole sentence in addition to the 31 years he has spent in prison on death row would violate the constitutional prohibition against double jeopardy. He claims that the time he spent on death row was the "functional equivalent" of an additional punishment that was not mandated by the legislature. This is a novel argument, which we reject. By this reasoning, *any* sentence imposed at this juncture would violate double jeopardy. We are aware of no authority for this proposition, and defendant cites no authority that is on point.

DISPOSITION

The judgment is affirmed.

/s/
BLEASE, Acting P. J.

We concur:

/s/
ROBIE, J.

/s/
MAURO, J.